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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-572

NANCY L. FARHA, et al., BILLY JOE LINKER,
Petitioners,

vs.

UNIFIED SCHOOL DISTRICT, No. 259
WICHITA, KANSAS, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

TED K. SHARP
327 Beacon Building
Wichita, Kansas 67202
Counsel for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030



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QUESTIONS ADDED BY RESPONDENTS

Respondents' attempt to add additional questions (Opposition Brief, page 6), and their rephrasing of petitioners' questions, to the extent that they become new questions, violate Supreme Court Rule 23, Sub. 1(c) and should not be considered.

Mills v. *Electric Auto-Lite Co.*, 90 S. Ct. 616.

Andrews v. *Louisville & Nashville R.R. Co.*, 92 S. Ct. 1962.

PETITIONERS' QUESTION NO. 1

1. In restating petitioners' Question No. 1, respondent school board obscures rather than clarifies the issue.

It is not only the statutory definition of a school day which limits school board action, but petitioners' Question No. 1 goes to the source of the power assumed by administrators, federal or state, in creating a "Selective Service Act" to choose "certain selected citizens" (students) to be burdened with additional transport time, which equates to a lengthening of the statutory school day.

As set out in the petition, K.S.A. 72-1106[1] burdens the student to attend school for six hours per day, while K.S.A. 72-1111[2] casts a burden on the parent to see that the child attends. It appears obvious that ordinarily any transport time is a voluntary matter and depends entirely upon where in a particular statutory sub-district attendance zone[3] the student's parents choose to locate their home in

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1. KSA 72-1106. School month; employment of non certificated personnel. A school month shall consist of four (4) weeks of five (5) days each of six (6) hours per day on which pupils of a school are under direct supervision of its teacher or teachers while they are engaged together in educational activities. Time reserved for parent-teacher conferences for discussions on the progress of pupils may be considered part of the school day. Board of education may employ non-certificated personnel to supervise pupils for noninstructional activities.

2. KSA 72-1111. "Compulsory school attendance; exemptions. Every parent, guardian or other person in the state of Kansas, having control over or charge of any child who has reached the age of seven (7) years and is under the age of sixteen (16) years, shall require such child to attend continuously a public school or a private, denominational or parochial school taught by a competent instructor, each school year, for such period as the public school of the school district in which the child resides is in session. . . ."

3. K.S.A. 72-8212. "Thirty units of instruction requirement; general powers of boards; attendance subdistricts; sale of unneeded property; acquisition of property. Every unified district shall maintain, offer and teach grades one (1) through twelve (12), with kindergarten being optional, and shall offer and teach at least thirty (30) units of instruction in grades nine (9) through twelve (12) in each and every high school operated by the board. Such units of instruction, to qualify for the purpose of this act, shall have the prior approval of the state board of education. *The board shall make all necessary rules* and regu-

(Continued on following page)

relation to the school building that serves their particular statutory sub-district.[4] Kansas school administrators may legally redraw the boundaries of these statutory sub-districts which affects all within the sub-district, but may not add to the students' or parents' statutory burdens by reassigning out of the sub-district.

PETITIONERS' QUESTION NO. 2

2. Respondents attempt to redefine petitioners' Question #2 by stating that petitioners mean to suggest that all students must be assigned to a school equidistant from their respective homes. Such an arrangement is physically impossible to attain and is no part of petitioners' Question #2.

Respondents then attempt to raise a completely new issue by rephrasing petitioners' Question #2 in the terms of an obligation, whereas petitioners' Question #2 is designed to produce an answer as to the source of the power assumed by the Respondent Board, and whether the assumption of administrative power by Respondent School Board is based upon a grant from the Congress, the State Legislature, or was merely assumed; and whether, as utilized, it effectively established a form of "penal servitude"[5]

Footnote continued—

lations for the government and conduct of such schools. *consistent with the laws of the state. The board may divide the district into subdistricts for purposes of attendance by pupils. . . .*" (Emphasis supplied)

4. (Map—Page 3 of the Record.)

5. C. J. S., Volume 70, page 386.

"The word 'penal' is one of the most elastic known to the law, and has many different shades of meaning. In its strict and primary sense, it denotes punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its laws. *However, it is also commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered.*"

as to the 12% selected to be bused away from their statutory sub-district attendance zones[4] (District Court Findings of Fact, page A15 of petition). Petitioners do not agree that their Question #2 should be rephrased.

PETITIONERS' QUESTION NO. 3

3. Petitioners' Question #3 is stated by respondents as being unclear (Opposition Brief, page 5). The "color of law" under which the school district acted was obviously 42 U.S.C. Sec. 2000d, et seq., and 45 C.F.R. Part 80 as quoted by respondents (Opposition Brief, page 3).

The class alleged by petitioners as exempt from 42 U.S.C. 1981[6] is the 88% of the students admittedly not bused. (Page A15 of Petition setting out the U.S. District Judge's Findings of Fact that 12% were bused, and also stated in respondents' Opposition Brief, page 11.)

This 88% of the Wichita primary school population not bused obviously were granted a special immunity because they were allowed to remain undisturbed in their statutory attendance sub-districts.[4] Also immune were those groups mentioned on page A13 of the Petition, where in the District Judge's decision it was found as a fact "There were certain specifically-defined provisions in the Plan which, *in effect*, exempted a pupil from involuntary reassignment." (Emphasis supplied). These factors would leave petitioners' Question #3 as stated.

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6. Title 42 U.S.C. 1981.

"Equal rights under the law.

All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and *exactions of every* kind, *and to no other.*" (Emphasis supplied)

RESPONDENTS' STATUTORY CITATIONS

In reproducing certain Kansas Statutes or portions thereof, respondent school board appears to infer that a local school board has almost unlimited authority to transport students anywhere in the school district, rather than in the attendance sub-district. See K.S.A. 72-8302 (Opposition Brief, page 8).

To clarify this impression, petitioners reproduce K.S.A. 72-8302 in full.[7] It will be noticed that the portion quoted by the respondent school board is permissive only, while Sections (a), (b) and (c) are mandatory in each case where the distance is more than (2½) miles. This statute therefore authorizes the expenditure of public school funds for pupil transportation and is not a grant of power to cross-bus from one attendance zone to another.

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7. K.S.A. *72-8302.* The board of education of any school district *may* provide or furnish transportation *for students* to or from any school *of* the school district.

Every school district shall provide or furnish transportation for every pupil who resides in the school district and who attends any of the grades kindergarten through twelve at a school of the school district in the following cases:

(a) The residence of the student is inside or outside the corporate limits of a city, the school building attended is outside the corporate limits of a city and the school building attended is more than two and one-half (2½) miles by the usually traveled road from the residence of the student, or

(b) the residence of the student is outside the corporate limits of a city, the school building attended is inside the corporate limits of a city and the school attended is more than two and one-half (2½) miles by the usually traveled road from the residence of the student, or

(c) the residence of the student is inside the corporate limits of one city, the school building attended is inside the corporate limits of a different city and the school building attended is more than two and one-half (2½) miles by the usually traveled road from the residence of the student.

ARGUMENT

Respondent School Board's Argument #I. "The Petition Cites No Federal Court Decisions Which Are in Conflict with the Decision of the Court of Appeals in This Case."

Respondents' Argument #I (page 13 of their Brief in Opposition) states that *McDaniel* v. *Barresi*, 402 U.S. 39, 28 L.Ed. 2d 582, does not preclude federal administrators from insisting on cross-busing in school cases. The facts are, this court held (402 U.S. at 41/42 and 28 L.Ed. 2d at 585) "The sections relied upon by respondents (42 U.S.C. Secs. 2000c (b), 2000c-6) are directed only at federal officials. . .".

Thus, the decision says that the congressional restrictions expressed in Title IV of the Civil Rights Acts unquestionably foreclose and limit the acts of federal administrators whether or not the administrators were defendants in the *McDaniel* case. If respondents maintain federal officials were not so restricted, to whom do the Title IV restrictions apply? This question needs to be answered.

Further, if Title IV restrictions do not apply to state administrators, neither are their powers enlarged thereby. There are many tools available for desegregation. Cross-busing is only one, and not available to Kansas administrators under Kansas law.

Respondents' statement (page 16 of their Opposition Brief) that "The only test for the remedy is its effectiveness" is a half-truth and attempts to ignore petitioners' point which is *"Is the remedy a legal one under Kansas law?"* If their "effectiveness test" is the only test, then

respondents would condone malfeasance in its operation, which petitioners contend they have actually done.

Respondent School Board's Argument #II. "The Court of Appeals Did Not Decide an Important Issue of Kansas Law in Conflict with Any Kansas Statute or Decision of the Kansas Supreme Court."

It is true that the Tenth Circuit Court of Appeals did not rule specifically upon three issues of Kansas law which were presented to it in this case.

In expanding on their argument, respondent school board in their Opposition Brief, page 17, state "The respondent school district is also expressly authorized to negotiate for, and expend federal funds in accordance with federal law by K.S.A. 72-6201, et seq.[8]"

Petitioners here state that federal law mandates desegregation, not cross-busing, and if federal administrators make cross-busing a requirement in order for local boards to obtain federal funds, absent a court plan adoption, or court order, such federal officials transgress the restrictions of Title IV of the Civil Rights Act.

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8. Kansas Statutes Annotated 72-6201:

Federal fund applications by school districts and community junior colleges; use of federal funds. The board of education of any school district . . . may make and file applications for federal funds appropriated and made available for school purposes by federal law. Any school district . . . may receive from the federal government, or any of its agencies, any funds made available under existing law, rules or regulations, or that may hereafter be made available, for any and all school purposes. Any such board may expend the same for said purposes *in accordance with the law*, and the rules, regulations *and requirements* under which such funds are made available and such expenditures may be made even though the same were not included in the budget for the period in which such expenditures are made. (Emphasis supplied)

The extent to which K.S.A. 72-6201 grants power to a local school board is highly debatable but it is certain that the statute does not grant the board authority to violate student's civil rights, nor applicable state laws, nor the Kansas Constitution.

Respondent School Board's Argument #III. "The Constitutional Questions Raised by Petitioners Have Recently Been Settled by This Court."

Respondents state that the Court of Appeals found that "All of the elementary students participate, and are all equally subject to the plan" (Petition, page A3) but that petitioners do not take issue with this finding.

The quoted statement, from the opinion of the Court of Appeals, is not a finding by the Court but merely dicta, for the reason that the question was not before the Court. In the District Court there was a Conclusion of Law (page A30 of Petitioners' Brief). "The facts have shown that all elementary students in District 259 were subject *to the lottery.*" (Emphasis supplied). While in the Pre-Trial Order all parties including respondent school board, stipulated (page 11 of the Record Item 5(h)), "Only Caucasions and Negroes are subject to random selection for school assignment under the terms of the desegregation plan. Other minority groups in the school system (e.g. Orientals, American Indians and Spanish-Americans) are specifically excluded from random selection under the terms of the plan." Respondents are bound by this stipulation.

Being subject to the lottery and being subject to actual selection for reassignment were two different things, as the District Court stated in its Findings of Fact (page A13 of Petitioners' Brief).

CONCLUSION

In the present case, respondents claim that *McDaniel* v. *Barresi, supra,* sets no limitation upon the powers of federal administrators. At the same time the *Swann* v. *Charlotte-Mecklenberg* case and others which outline the powers of the court to order busing, or to adopt administrative plans which require busing are freely cited as justification for administrative action which, as here, orders busing without the intervention or review of a federal court, before implementation.

Petitioners cannot believe that the intent of *Swann* was to grant administrators, federal or state, a blanket authority to order busing in school cases, on the basis that "if the courts can do it, so can we" which approach has been erroneously approved in this case by the decision of the Tenth Circuit Court of Appeals.

The granting of the petitioners' prayer for a Writ of Certiorari to resolve the issues and questions raised is strongly urged upon the Court.

TED K. SHARP
Suite 327 Beacon Building
Wichita, Kansas 67202
264-1344
Counsel for Petitioners